U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship and Immigration Services

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[redacted]

Date: DEC 15 2011 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition, and the appeal is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a network and computer software business. It seeks to employ the beneficiary permanently in the United States as a systems software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, which the U.S. Department of Labor (DOL) approved, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

On appeal, counsel submitted a brief, the beneficiary's pay stubs for 2007 and 2008, the beneficiary's 2007 IRS Form W-2, and additional evidence. The AAO sent the petitioner a notice of adverse information on September 15, 2011, asking the petitioner to submit copies of its 2007 to 2010 Internal Revenue Service (IRS) tax returns, the beneficiary's IRS Form W-2 Wage and Tax Statements from 2008 onwards, and detailed information regarding the employment and payment history of its 14 other Form I-140 and Form I-129 beneficiaries. The petitioner submitted its 2007 to 2010 tax returns on October 18, 2011 as well as the beneficiary's IRS Forms W-2 for work that she had performed for the petitioner in 2008 to 2010. Counsel for the petitioner noted that the petitioner would not be providing requested information regarding its employment and payment of the 14 other Form I-140 and Form I-129 beneficiaries. The AAO will uphold the director's decision. The AAO will conclude that the petitioner has failed to demonstrate its continued ability to pay the beneficiary from the priority date onwards.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a U.S. doctorate or a foreign equivalent degree." *Id.*

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the petitioner filed the ETA Form 9089 on October 2, 2007. The proffered wage as stated on the ETA Form 9089 is $65,000.00 per year. The ETA Form 9089 states that the position requires a master's degree in computer science or electrical engineering and expertise in SAN storage systems.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2001 and to employ 45 workers currently. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, which the beneficiary signed on November 30, 2007, the beneficiary claimed to have worked for the petitioner since October 2007.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 alien employment certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). While this case may have involved different facts as noted by counsel, it does stand for the proposition that the job offer must be realistic. In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2007 or subsequently.

Counsel submitted IRS Form W-2 Wage and Tax statements from the petitioner to the beneficiary for years 2007 to 2010 in the amounts of $59,850.74, $64,383.28, $54,500.00, and $42,000.00 respectively. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date as noted above. Since the proffered wage is $65,000.00 per

year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, which is $5,149.26, $616.72, $10,500.00, and $23,000.00 from 2007 to 2010 respectively.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *see also Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Federal courts have upheld the use of federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2). *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

The petitioner's tax returns demonstrate its net income for 2007 to 2010, as shown in the table below.

- In 2007, the Form 1120S stated net income of -$5,821,294.00.[1]
- In 2008, the Form 1120S stated net income of -$3,376,619.00.
- In 2009, the Form 1120S stated net income of -$2,071,896.00.

[1] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed November 10, 2011) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, depreciation, losses, expenses, and income shown on its Schedule K for 2007 to 2010, the petitioner's net income is located on Schedule K of its tax returns.

- In 2010, the Form 1120S stated net income of -$788,666.00.

The petitioner did not have sufficient net income to pay the difference between wages actually paid and the proffered wage for 2007 to 2010.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2007 to 2010, as shown in the table below.

- In 2007, the Form 1120S stated net current assets of -$2,326,194.00.
- In 2008, the Form 1120S stated net current assets of -$2,401,988.00.
- In 2009, the Form 1120S stated net current assets of -$3,045,105.00.
- In 2010, the Form 1120S stated net current assets of -$3,211,589.00.

Based on the petitioner's net current assets, it cannot demonstrate its ability to pay the proffered wage for 2007 to 2010 even if the petitioner's net current assets are combined with wages paid to the beneficiary.

Therefore, from the date the DOL accepted the ETA Form 9089 for processing, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, its net income, or its net current assets.

On appeal, counsel urges the AAO to consider the beneficiary's pay stubs from the petitioner for 2007 and 2008 as evidence of the petitioner's ability to pay. The AAO notes that these pay stubs constitute insufficient evidence of wages paid, because there is no evidence that they represent payment beyond those listed on the IRS Forms W-2.

In response to the AAO's September 15, 2011 notice, counsel asserts that the AAO has gone beyond its jurisdiction by requesting that the petitioner provide evidence of its ability to pay the other 14 Form I-140 and Form I-129 beneficiaries. Counsel declined to provide this requested evidence of the petitioner's employment of the 14 other beneficiaries, stating that the beneficiaries are not a part

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[2] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

of this case. The AAO notes that the petitioner must demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence according to 8 C.F.R. § 204.5(g)(2). Further, the petitioner is obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the DOL accepted the ETA Form 9089 for processing.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa,* USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner maintained less gross sales in 2010 than in 2007 and has declined to provide evidence regarding its ability to pay its other Form I-140 and Form I-129 beneficiaries. The petitioner has additionally not demonstrated its ability to pay the beneficiary the difference between wages actually paid and the proffered wage for 2007 to 2010 based upon its net income or net current assets. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.